IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT JACKSON
Assigned on Briefs January 23, 2002

STATE OF TENNESSEE v. RICHARD LYNN BATTS

Appeal from the Circuit Court for Obion County
No. 1-36 William B. Acree, Jr., Judge

No. W2001-01602-CCA-R3-CD - Filed February 28, 2002

The defendant, Richard Lynn Batts, was convicted of driving under the influence, third offense, and violation of the implied consent law. The trial court imposed a sentence of 11 months and 29 days with 120 days' incarceration and the balance to be served on probation for the DUI offense. The judgment provided for a three-year period of license revocation. See Tenn. Code Ann. § 55-10-401(a)(1). For violation of the implied consent law, the trial court imposed a concurrent one-year period of license revocation. See Tenn. Code Ann. § 55-10-406. In this appeal of right, the defendant contends that the evidence was insufficient to establish that he was in physical control of his vehicle. The judgment for violation of the implied consent law is modified to establish that the one-year license revocation period is to run concurrently with the three-year revocation for the defendant's DUI conviction. In all other respects, the judgments are affirmed.

Tenn. R. App. P. 3; Judgments of the Trial Court Affirmed as Modified

GARY R. WADE, P.J., delivered the opinion of the court, in which JAMES CURWOOD WITT, JR., and NORMA MCGEE OGLE, JJ., joined.

Joseph P. Atnip, District Public Defender (at trial and on appeal), and Colin Johnson, Assistant District Public Defender (at trial), for the appellant, Richard Lynn Batts.

Paul G. Summers, Attorney General & Reporter; Braden H. Boucek, Assistant Attorney General; and Allen Strawbridge, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

At approximately 1:30 A.M. on November 4, 2000, Officer Brandon Adams of the South Fulton Police Department, while on routine patrol, observed a vehicle parked behind Dot's Bar. Upon a closer examination, Officer Adams saw the defendant asleep in the front seat of his car. The car keys were in the defendant's left hand. Sergeant David Crocker arrived at the scene in a separate vehicle. Sergeant Crocker identified the defendant, knocked on the window in order to wake him, and asked him to step outside of the vehicle. The defendant had trouble standing, slurred his speech,

and smelled of alcohol. While Officer Adams was checking on the status of the defendant's driver's license, the defendant told Sergeant Crocker that he was cold and that he intended to leave the premises. The defendant remarked, "If we are going to stand here all night, I'm going home." The defendant opened the door of his vehicle and tried to start the engine. When "he got back halfway in the driver's seat," the officers handcuffed the defendant and placed him in the back seat of Officer Adams' police vehicle. The defendant refused to submit to alcohol tests. Officer Adams, who returned later to drive the defendant's vehicle to an impound lot, described the vehicle as fully operable. Each of the two officers described the defendant as "very intoxicated," too intoxicated to perform a field sobriety test.

At trial, the defendant admitted that he was intoxicated. Because the bar closed at midnight, he reasoned that he had been in his car for at least an hour and a half. When police arrived, the keys were not in the ignition and the engine was off. The defendant contended that his father, who had driven him to Dot's, left approximately two hours earlier to play pool at a pool hall. The defendant claimed that his father intended to return in order to drive him home. The defendant stated that his intention was to wait in the car until his father came back.

Moss Batts, the defendant's father, testified that he shot pool with his son at Dot's Bar that night but left at about 10:00 P.M. in order to go to the Tennessee Pool Room. Batts stated that he instructed his son not to drive and to wait in the vehicle for his return. He claimed that he gave his son a set of car keys so he could unlock the car door. Batts explained that he decided to go to Paducah, Kentucky, before returning to Dot's Bar at approximately 2:00 A.M. He stated that neither his son nor his car was in the parking lot at the time of his return.

As indicated, the defendant acknowledged that he was in no condition to drive and speculated that someone had "slipped [him] a Mickey" due to the extent of his intoxication. The only significant conflict in the testimony offered by the state and the defense had to do with whether the vehicle was in the parking lot at 2:00 A.M. While the defendant's father contended that the vehicle was not there at that time, Officer Adams testified that the car was not removed until almost 3:00 A.M.

The defendant argues that the state was unable to establish that he was in physical control of the vehicle as required by Tennessee Code Annotated section 55-10-401(a)(1), which provides as follows:

> It is unlawful for any person to drive or to be in physical control of any automobile or other motor driven vehicle on any of the public roads and highways of the state, or on any streets or alleys, or while on the premises of any shopping center, trailer park or any apartment house complex, or any other premises which is generally frequented by the public at large, while: (1) Under the influence of any intoxicant, marijuana, narcotic drug, or drug producing stimulating effects on the central nervous system; . . . .

The state insists that the defendant not only attempted to enter the car and operate the vehicle but that the jury was entitled to infer that the defendant was in physical control because he was asleep in the driver's seat with the keys in his hand.

On appeal, the state is entitled to the strongest legitimate view of the evidence and all reasonable inferences which might be drawn therefrom. State v. Cabbage, 571 S.W.2d 832, 835 (Tenn. 1978). When the sufficiency of the evidence is challenged, the relevant question is whether, after reviewing the evidence in the light most favorable to the state, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. Tenn. R. App. P. 13(e); State v. Williams, 657 S.W.2d 405, 410 (Tenn. 1983).

The credibility of the witnesses, the weight to be given their testimony, and the reconciliation of conflicts in the evidence are matters entrusted exclusively to the jury as the trier of fact. Byrge v. State, 575 S.W.2d 292, 295 (Tenn. Crim. App. 1978). This court may not substitute its inferences for those drawn by the trier of fact from the evidence. Liakas v. State, 199 Tenn. 298, 305, 286 S.W.2d 856, 859 (1956). This rule applies to findings of guilt based upon direct evidence, circumstantial evidence, or a combination of direct and circumstantial evidence. State v. Dykes, 803 S.W.2d 250, 253 (Tenn. Crim. App. 1990).

In State v. Lawrence, 849 S.W.2d 761, 765 (Tenn. 1993), our supreme court adopted a totality of the circumstances test to determine whether a defendant, in circumstances such as these, was in physical control of the vehicle. Factors such as "the location of the defendant in relation to the vehicle, the whereabouts of the ignition key, whether the motor was running, the defendant's ability, but for his intoxication, to direct the use or non-use of the vehicle, or the extent to which the vehicle itself is capable of being operated or moved under its own power or otherwise" are relevant considerations. Id. Our supreme court interpreted the legislation as "'intended to enable the drunken driver to be apprehended before he strikes.'" Id. (quoting Hughes v. State, 535 P.2d 1023, 1024 (Okla. 1975)).

In State v. Zan Ray McCracken, No. E2000-01762-CCA-R3-CD (Tenn. Crim. App., at Knoxville, July 19, 2001), a conviction for driving under the influence was upheld when the defendant was asleep at the wheel of his truck. The keys were in the ignition and the lights were on but the engine was not running. The truck was parked on the side of a public street.

In State v. Johnny Wade Meeks, No. 03C01-9811-CR-00411 (Tenn. Crim. App., at Knoxville, Dec. 3, 1999), a panel of this court ruled that the evidence was sufficient to support a conviction for driving under the influence. Meeks, while intoxicated, was slumped over the steering wheel of his vehicle while it was parked in a restaurant parking lot. The engine was running and the lights were turned on. While the defendant accurately submits that the evidence of Meeks' physical control was more substantial than in the case at issue, that does not mean that the evidence here is insufficient. Each of the officers testified that the defendant, while he was in possession of the car keys and after the police had arrived, attempted to re-enter his car after expressing an intent to drive away. Sergeant Crocker testified that the defendant "stated that he was cold, we [weren't] doing

anything and he was leaving." There was testimony that he tried to start the car. From these circumstances, the jury could have inferred that the defendant was in physical control of the vehicle and, absent the officers' intervention, would have driven away.

While this court in Meeks described the facts of that case as testing "the boundaries of the driving under the influence statute" on the issue of physical control, that does not mean, in our view, that its facts constitute the minimum standard of sufficiency. By use of the Lawrence test, it is our conclusion that the evidence was sufficient. Here, the defendant was in the driver's seat of a car parked in a commercial parking lot. The car was operable. He had the keys in his hand, was alone in the vehicle, and was fully capable, except for his intoxication, of driving the car. Most importantly, after he was removed from the vehicle, he complained about the weather and the officers' inaction, stated his intention to leave, and attempted to re-enter the vehicle and start the engine.

Finally, although not raised by the parties, we observe that the judgment of conviction for the defendant's violation of the implied consent law specifies that the one-year license revocation is to run consecutively to the three-year license revocation for DUI. The transcript, however, indicates that the trial court ordered the revocations to run concurrently. In the event of such a discrepancy, the transcript will control. See, e.g., State v. Zyla, 628 S.W.2d 39, 42 (Tenn. Crim. App. 1981). We therefore modify the judgment to reflect concurrent revocation.

Accordingly, the judgment for violation of the implied consent law is modified to establish that the one-year license revocation period is to run concurrently with the three-year revocation for the defendant's DUI conviction. In all other respects, the judgments are affirmed.

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GARY R. WADE, PRESIDING JUDGE